

FCC MAIL SECTION

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

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DISPATCHED BY

FCC 92M-874

In re Applications of)	MM DOCKET NO. 92-111 ✓
DEAS COMMUNICATIONS, INC.)	File No. BPH-910208MB
HEALDSBURG BROADCASTING, INC.)	File No. BPH-910211MB
HEALDSBURG EMPIRE CORPORATION)	File No. BPH-910212MM
For Construction Permit for a)	
New FM Station on Channel 240A)	
in Healdsburg, California)	

MEMORANDUM OPINION AND ORDER

Issued: August 11, 1992; Released: August 13, 1992

1. Under consideration are Petition for Leave to File Corrected Amendment, filed July 16, 1992 by Healdsburg Broadcasting, Inc.; Petition to Enlarge Issues, filed July 13, 1992 by Healdsburg Broadcasting, Inc.; Response to Order to Show Cause, filed July 16, 1992 by Healdsburg Broadcasting, Inc.; and Petition for Leave to File Consolidated Reply, filed July 29, 1992 by Healdsburg Broadcasting, Inc.

Order to Show Cause; Corrected July 16, 1992 Amendment

2. On June 19, 1992, HBI, in response to an order in the HDO, petitioned for leave to amend to correct its engineering showing and demonstrate that its proposal would comply with 47 C.F.R. §73.215(b)(2)(ii). However, the Bureau's technical review of the June 19th amendment found that HBI's amendment failed to comply with another rule not mentioned in the HDO, §73.316(b)(2) and HBI's petition for leave to amend was denied because its technical proposal was still not consistent with the rules. Pursuant to the "hard look" policy, the Bureau requested that HBI's application be dismissed. HBI was provided with an opportunity to show cause why its application should not be dismissed since it could not respond under the Commission's rules to the Bureau's opposition. HBI has responded to the order to show cause and has again petitioned for leave to amend.

3. HBI states that the engineering information about its proposed antenna which was supplied to its consulting engineer, Stephen C. Petersen, by the antenna manufacturer, Jampro, was inaccurate and that this caused the additional rule violation. When Jampro's error is corrected, HBI argues, its amendment will comply with §73.316(b)(2). HBI argues that its application should not be dismissed because its June 19, 1992 amendment cured those matters required by the Bureau in the HDO, the antenna height and contour overlap deficiencies. (HBI concedes that it did not meet all the concerns of HDO ¶9 but it maintains it did meet all deficiencies listed in the HDO ordering clause ¶20 of the HDO.) HBI argues that it failed only to remedy a "de minimis radiation pattern error which the Bureau did not note in its review of HBI's initial and amended Application" HBI urges that it does not violate the "hard look" standards since "all of the elements of the engineering data required for acceptability" are contained in the June 19, 1992 amendment. HBI argues that its engineer could not have foreseen the error because it is so esoteric. HBI argues that it meets the good cause test.

4. The Bureau urges that HBI be dismissed because it failed to comply with the Commission's engineering rules even after it had been given a second chance in the HDO. The Bureau argues that the presiding officer has no authority to give HBI another opportunity to amend since once a matter has been decided in the HDO, the presiding officer "is not free to reconsider." Citing, Atlantic Broadcasting Co., 5 F.C.C. 2d 717 (1966).

5. Deas also opposes granting the July 16, 1992 petition for leave to amend. Deas argues that HBI submitted the same inaccurate radiation pattern in September 1991 that it did in June 1992. That its error went uncorrected for 10 months. Deas also urges that any trained engineer could have immediately spotted the error. Deas, citing Pueblo Radio Broadcasting Service, 5 FCC Rod 6278 (1990), argues that HBI cannot rely on the Bureau to find and alert it to errors in its filing. Deas maintains that it is HBI's duty to insure that it has complied with the Commission's rules.

6. HBI responds by urging that if the error in its radiation pattern had been easily evident, the HDO would have mentioned it. HBI supports that claim by pointing out that four sets of engineers failed to see the problem. Because the amendment raised matters not considered in the HDO, it is HBI's view that the hearing officer is not foreclosed from considering new facts. HBI points out that both Deas and the Bureau missed the error initially which demonstrates how difficult the error was to see. HBI urges that once the error was called to its attention, it amended within 12 days.

7. Matters once ruled on by the Bureau obviously are not going to be subsequently reexamined. Atlantic Broadcasting Company (WUST), 5 F.C.C. 2d 717 (1966); Empire State Broadcasting Corporation (WWKB), 5 FCC Rcd 2999, 3003 (Rev. Bd. 1990); Frank H. Yemm, 39 Radio Reg. P&F 2d 1657, 1659 (1977). But this is not a case involving a matter considered by the Bureau in the HDO. It involves, instead, a rule violation that was not discovered in processing HBI's application. But the Commission has recently pointed out that "the rules for processing FM applications make clear defective applications, e.g. those not in accordance with FCC rules are subject to dismissal." SBM Communications, Inc., 7 FCC Rcd 3436, 3437 (1992). To cure a defect as of right, it must be accomplished by the close of the filing window. Id. To correct the defect after hearing, HBI is required to make a good cause showing in light of the "hard look" rules and 47 C.F.R. §73.3522(b)(1). Id. The Commission held in SBM Communications "that any post-designation attempt to cure either tenderability or acceptability defects must be analyzed in light of both pertinent 'hard look' requirements and ordinary good cause considerations in order to avoid undermining the benefits of the 'hard look' policy." Id., at n. 5.

8. When the HDO was issued HBI was on notice that its engineering was not in compliance with the rules. It then had an opportunity to review and correct the defects. Under the "hard look" doctrine it is not up to the processing line to identify defects; that is the applicant's obligation and responsibility. The issue is not as HBI presents it, that only easily noticeable problems are subject to the "hard look." HBI, as the Commission has repeatedly stated, had the obligation to insure that its proposal complies with the rules. If the people that HBI hired to assist in preparing its technical proposal did not check it for compliance with the rules, that is not an excuse. As it turns out, HBI's technical proposal violated more than one Commission rule. From the circumstances presented here it is evident that HBI did not exercise due diligence. HBI had years to review its proposal and following release of the HDO it had notice that all was not right and that it was vulnerable to dismissal. The error was not esoteric since the required showing is governed by rule and there is no evidence a violation of the Commission's technical rules is de minimis. The Bureau has indicated that HBI's failure to comply with §73.316(b)(2) would have resulted in HBI's application being dismissed if it had been discovered before designation of this case for hearing. While HBI asserts that it has presented new facts, it is simply a new way of casting its view that until the Bureau alerted it to the defect it had good cause for not submitting an acceptable technical proposal. HBI's application will be dismissed for violating the "hard look" policy and for failing to establish good cause for its violation.

HBI's Petition to Enlarge Against Deas

9. HBI petitions to enlarge issues against Deas to determine whether Deas misrepresented to the Commission that he had tacit approval for his tower site from the Dry Creek Valley Association. HBI urges that Deas never had any kind of approval from the association. It supports that allegation with a letter from Charles Richard, the President of Dry Creek Valley Association, Inc., in which he states that Deas' statement is flatly wrong. Mr. Richard points out that the association has had a consistent and long-standing opposition to new transmission towers in rural areas. Mr. Richard also states that while Deas appeared before the board of the association, no position was taken because Deas had not filed any application with the county. Deas urges that Richard's letter confirms his representation that there was no opposition to his proposal. Deas states that he believed he had the board's tacit approval because he did not encounter any "hostility and received no negative comments." Deas claims the association president (the president at the time of the meeting was Edwin Wilson) said after the meeting he did not see any problem with his tower proposal.

10. In reply, HBI submits another letter from Charles Richard who restates the association's opposition to Deas locating his tower at the site proposed. HBI does not provide a statement from Edwin Wilson who purportedly told Deas he would not have a problem with his proposal. The issue raised is whether Deas did not have reason to believe after meeting with the association board that he would have their approval. HBI has not shown that there is any question about Deas' candor in his representation about the association's views; the petition to enlarge is denied.

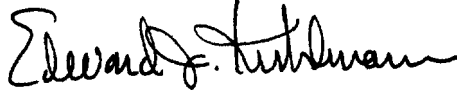
ACCORDINGLY, IT IS ORDERED that the petition for leave to file corrected amendment, filed July 16, 1992 by Healdsburg Broadcasting, Inc. IS DENIED and the amendment IS REJECTED.

IT IS FURTHER ORDERED that the petition for leave to file consolidated reply, filed July 29, 1992 by Healdsburg Broadcasting, Inc. IS GRANTED.

IT IS FURTHER ORDERED that the response to order to show cause, filed July 16, 1992 by Healdsburg Broadcasting, Inc. IS DENIED and HBI's application (File No. BPH-910211MB) IS DISMISSED WITH PREJUDICE and IS DELETED from the caption.

IT IS FURTHER ORDERED that the petition to enlarge issues,
filed July 13, 1992 by Healdsburg Broadcasting, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in cursive script, reading "Edward J. Kuhlmann".

Edward J. Kuhlmann
Administrative Law Judge